No. 21A____

In the Supreme Court of the United States

JOHN DOE, an individual; JANE DOE, individually and as parent and next friend of JILL DOE, a minor child; and JILL DOE, a minor child, by and through her next friend, JANE DOE,

Applicants,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT; RICHARD BARRERA, in his official capacity as Board President; SHARON WHITEHURST-PAYNE, in her official capacity as Board Vice President; MICHAEL MCQUARY, in his official capacity as Board Member; KEVIN BEISER, in his official capacity as Board Member; SABRINA BAZZO, in her official capacity as Board Member; and LAMONT JACKSON, in his official capacity as Interim Superintendent,

Respondents.

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND STAY PENDING RESOLUTION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a government must, under *Lukumi* and *Tandon*, extend a religious exemption from a vaccination mandate where it has already granted a series of categorical exemptions from the vaccination mandate to others.

2. Whether a government must, under *Lukumi* and *Fulton*, extend a religious exemption from a vaccination mandate where it has provided for individual and discretionary exemptions from the vaccination mandate.

3. Whether requiring parents to provide parental consent to a vaccination procedure to be conducted on their child against their and their child's sincere religious beliefs triggers strict scrutiny under *Wisconsin* v. *Yoder*.

4. Whether a government must, under *Smith*, extend a religious exemption from a vaccination mandate where it does not apply the vaccination mandate neutrally or in a generally applicable way.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.6, John Doe, Jane Doe, and Jill Doe were plaintiffs below in proceedings before both the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the Southern District of California, and they each represent that they do not have any parent entities and do not issue stock.

Respondents, who were defendants in the state court proceedings, are San Diego Unified School District; Richard Barrera, in his official capacity as Board President; Sharon Whitehurst-Payne, in her official capacity as Board Vice President; Michael McQuary, in his official capacity as Board member; Kevin Beiser, in his official capacity as Board member; Sabrina Bazzo in her official capacity as Board member; and Lamont Jackson, in his official capacity as Interim Superintendent of the San Diego Unified School District.

LIST OF RELATED PROCEEDINGS

Doe v. *San Diego Unified School District*, No. 21-56259 (9th Cir. Dec. 4, 2021), App.4-36.

Doe v. *San Diego Unified School District*, No. 21-56259 (9th Cir. Nov. 28, 2021), App.37-40.

Doe. v. *San Diego Unified School District*, No. 3:21-cv-1809 (S.D. Cal. Nov. 18, 2021), App.41-52.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court for the Ninth Circuit:

Pursuant to Rules 22 and 23 of this Court, and 28 U.S.C. 1651(a), Applicants respectfully request an injunction preventing enforcement of the San Diego Unified School District's COVID vaccination requirement for Applicant Jill Doe. In the alternative, Applicants ask that this application be treated as a petition for certiorari and granted, so that this Court can promptly address on its merits docket the important issues presented here. In either case, Applicants request an administrative stay during the emergency briefing and deliberations on this application.

* * *

Unlike almost every school district in the country, San Diego Unified School District requires its students to be vaccinated to attend classes in person. It provides secular exemptions for over 85% of its students. But it does not allow students any religious exemptions. If she does not provide documentation of vaccination by January 4, Applicant Jill Doe—a healthy sixteen-year-old junior who has already recovered from COVID-19—will be excluded from her classes and consigned to "iHigh" because she does not qualify for any secular exemptions and has a religious objection to the COVID-19 vaccination. She will also be excluded from her school sports teams, losing a crucial year of playing time. Her classmates—some of whom have threatened to harm whoever brought this lawsuit—may soon learn her vaccination status and her identity.

In stark contrast to the effective expulsion from her school and sports teams that Jill will receive for her religious exercise, the District exempts *tens of thousands* of

Jill's classmates from the same mandate for secular reasons. Some will receive medical exemptions. Others will be given delays of the mandate for a variety of reasons (including children of military personnel, foster children, migrant youth, and homeless children). Over 80,000 students will be exempted because the District has chosen not to require vaccination for students under 16, since the vaccines have only FDA emergency authorization and not full FDA approval for those age 15 and younger. Hundreds more for whom the vaccine *is* fully FDA-approved—namely those who turn 16 in the eight months between November 1 and the end of the school year—will also be exempted for what appears to be pure administrative convenience. And all teachers (but no students) can apply for and receive religious exemptions.

Those in the exempted groups above are permitted to continue attending in-person school and participating in school sports. These tens of thousands of exempted students carry the same or greater risk of contracting and spreading COVID as Jill—yet they will continue to attend the same classes, with the same teachers, and participate in the same sports activities from which Jill will be banished. The District believes that medical reasons, secular status, concerns about FDA approval, administrative convenience, and accommodation of *adult* consciences are important enough to justify allowing unvaccinated individuals to come to school. The only difference between the District's harsh treatment of Jill and its accommodation of tens of thousands of other students is the *reason* Jill needs an exemption: her sincere religious beliefs. That discriminatory treatment triggers strict scrutiny under the Free Exercise Clause.

The lower courts thought this discrimination did not even "raise a serious question" about neutrality or general applicability. Instead, relying on *Employment Division* v. *Smith*, the courts below thought the District could exclude Jill for her religious exercise because the exclusion was "rational." But as Judge Ikuta recognized in dissent, the mandate obviously "treats secular and religious [individuals] differently" even though an unvaccinated person in either group poses "similar risks" of transmitting COVID. Thus, under this Court's precedents in *Lukumi, Tandon*, and *Fulton*, the District could only continue with its discrimination if it survived strict scrutiny. And the District could not possibly hope to survive strict scrutiny when it allows so many unvaccinated people on its campuses, and when nearly every other school district in the Nation operates without such a mandate.

Under any proper understanding of the Free Exercise Clause, Jill and her parents have an indisputably clear right to relief. At a minimum, this Court should grant the application and protect Jill's ability to continue her education in person, just like her classmates who are allowed to attend school unvaccinated for non-religious reasons. That would also allow her to continue playing with her vaccinated and unvaccinated teammates.

The exigencies of COVID may have deprived lawyers and judges of the more orderly timeframes and processes with which our legal system usually operates. But they should not be allowed to deprive Jill and others like her of the constitutional rights upon which that system rests. The District's uniquely punitive approach to religious students requires correction now, and Applicants respectfully ask this

Court's protection.

Finally, should the Court deem it inadvisable to provide emergency relief to Jill, Applicants respectfully request that the Court set this case for plenary review on a schedule that would allow Jill to return to her classes and her teams as soon as possible. The gravity of the Ninth Circuit's error, coming so soon after *Fulton*, *Tandon*, and *Diocese of Brooklyn*, is a powerful reason for the Court to grant Jill's alternative request to treat this application as a petition for certiorari and grant certiorari to further clarify Free Exercise law.

JURISDICTION

Applicants appeal from the Ninth Circuit's denial of emergency injunction pending appeal. This Court has jurisdiction under 28 U.S.C. 1651.

BACKGROUND AND PROCEDURAL HISTORY

A. The Applicants

Jill Doe is a 16-year-old junior enrolled at Scripps Ranch High School within the San Diego Unified School District. She is an excellent athlete who plays multiple sports for her high school and hopes to draw the attention of college recruiters and earn a sports scholarship through competition this coming semester. App.152, 273-76.[1] She has already recovered from COVID-19 and has since demonstrated immunity to COVID-19 exposure. App.152, 274.

Jill's sincere Christian beliefs prevent her from taking any of the now-available COVID-19 vaccinations due to their association with abortion. App.151, 273. Jill's

[1] We do not identify Jill's team sports to avoid inadvertently identifying her.

parents—John Doe and Jane Doe—share her religious beliefs. App.151, 273. The Does' sincerity is uncontested.

Yet under the District's mandate, Jill Doe cannot return to school next semester and will be relegated to an online independent study unless she violates her sincere religious beliefs. The District will also exclude her from all high school sports, dooming any chances at a sports scholarship. App.273.

Jill Doe's religious objection to the COVID-19 vaccine has also exposed her to threats of harm and retaliation. One of her teachers read a news article to the class about her lawsuit, and Jill testified that "certain students at my school got angry and upset about what I am doing. They're so upset that they claim that they want to find out who I am and hurt me." App.152.

B. The District's vaccine mandate and exceptions

The District is mandating COVID vaccination for approximately 15% of its total number of students and 40% of its high school students. On September 28, 2021, the District's Board of Education adopted its Vaccination Roadmap. App.108-109, 283-299. Stage 1 of the Roadmap requires vaccination of most staff and some students 16 and older. App.294. Later stages, which will be tied to full FDA authorization of vaccines, will apply to additional age groups. For those covered by Stage 1, if they do not submit evidence of being fully vaccinated by January 4, they will be barred from in-person instruction and extracurricular activities when the new semester begins on January 24. App.74, 295; San Diego Unified School District, *COVID-19 Vaccine: Student Vaccine FAQs*, https://perma.cc/EAG9-RSFF. Students who are not

vaccinated and not exempt from the requirement will be enrolled in "iHigh," the District's independent online study program. App.292, 297; App.74-75. They will be barred from in-person education and extracurricular activities, including sports. App.297, 322.[2]

The District's interim superintendent and board members made clear that no religious exemptions will be allowed. See App.259. But the vaccine mandate does not apply to the great majority of students in the District, along with certain staff, who are welcome to attend in-person instruction and participate in extracurricular activities so long as they continue masking and regular testing. App.116 (describing "Non-Pharmaceutical Interventions").

Exempted students and staff include:

Students under 16. The mandate categorically does not apply to students under 16. App.303. The District has approximately 97,675 students, App.112, with about 36,260 students in grades 9-12.[3] The District estimates that the 16-and-older group to whom the mandate applies consists of only 14,360 students. App.72. This means that over 83,000 District students, or 85% of the District's total number of students, are exempt. Similarly, over 60% of its high school students—that is, 21,900 teenagers

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[2] The District considers students fully vaccinated two weeks after their last dose, meaning that, in order to meet the January 4 deadline, students must receive their last dose no later than December 20. App.157, 295.

[3] Ed-Data, *District Summary: San Diego Unified*, https://perma.cc/Q2V5-7BX9 (total enrollment for grades 9-12 in the District for 2020-21 school year); see also App.112.

attending Jill Doe's school or one like it—are allowed to remain unvaccinated while attending school in person.

Students who turn 16 after November 1, 2021. Students who turn 16 after November 1, 2021, are not required to vaccinate immediately. The District permits them to remain in school for the entire academic year, including in-person instruction, extracurricular activities, and sports. App.122; see also *Student Vaccine FAQs*, https://perma.cc/DZV6-RE8X. These students do not need to be vaccinated until the start of the 2022-23 school year. *Ibid.*

Students with conditional admissions. The District has also created discretionary exceptions for students in five groups: "foster youth, homeless, migrant, military family, or have an IEP." App.297. Students in these groups may be "conditionally enrolled via in-person learning" before they are vaccinated. App.297. The District's Roadmap does not provide criteria or time limits for these exceptions except to specify that they do not include "religious or personal belief exemptions." App.297.

Students and staff with medical exemptions. Students and staff can apply for medical exemptions to vaccination, for which they can be eligible if a state-licensed medical professional articulates a "medical rationale" supporting exemption. App.323, 145-147; 259 ("case-by-case basis"); see also App.305 (staff).

Staff with religious exemptions. Staff members can apply for religious exemptions to COVID-19 vaccination. App.305, 138. Contrary to the Board President's assertion that religious exemptions are a "loophole" that results in "large

numbers" of people not getting vaccinated, only 1.7% of District staff—238 out of 14,000—had requested religious accommodations as of November 8. Compare App.259 with App.139 (describing religious accommodation requests based on Title VII and EEOC guidance).

Other exceptions. The District also allows students and others to be present on campus without vaccination. This includes some students with Individualized Education Programs (IEPs) covered by 20 U.S.C. 1415(j). App.7. It also includes visiting sports teams, since the District has chosen to continue competitions against schools without vaccination mandates. App.323. Until recently, the District also had a deferral for pregnant students, but the Interim Superintendent exercised his discretion to eliminate that deferral overnight after the Ninth Circuit relied on it to grant an injunction protecting Jill Doe. App.142-143.

C. Alternative approaches

Only about "[f]ive districts nationwide—all in California—have moved forward with a student [vaccine] mandate." App.338.[4] There are more than 13,000 public school districts in the United States, meaning that about 99.962% of school districts

[4] See Howard Blume, *34,000 L.A. Unified Students Have Not Complied with Vaccine Mandate, Signaling Problems Ahead, Los Angeles Times,* Dec. 7, 2021, https://perma.cc/D4CA-8KDP (noting that only a "few [districts] in the nation" require students to obtain a COVID-19 vaccine to attend classes); see also Matt Zalaznick, *Vaccine Tracker: Schools in 14 States Now Require Students to Get COVID Shots*, *District Administration,* Nov. 15, 2021, https://perma.cc/WT9S-92PW (listing some districts nationwide that require vaccinations for sports or extracurricular activities, but only a handful of California districts that mandate it as a condition of in-class attendance).

do not require vaccination in order to attend in-person classes.[5] Among states, only California has announced plans to impose a state-wide mandate for students, but that mandate does not take effect until July, and will contain a "personal beliefs" exemption. App.336-338. And the District is unusual even among California schools: not only have the vast majority declined to issue mandates ahead of the statewide mandate, some have provided religious exemptions. For example, Oakland Unified School District and Sacramento City Unified School District allow students to opt out of vaccination due to personal or religious beliefs. App.269.[6]

For students who are not subject to the mandate, Jill's school has a detailed plan in place to mitigate the spread of COVID, which includes steps such as masking, regular testing, improved ventilation, and lunch outdoors. App.305-306, 311-326. In addition, Applicants' expert, an M.D., PhD at Stanford, identified multiple ways the District could protect its students and staff, without forcing vaccination for religious objectors: daily symptom checking paired with rapid antigen tests; a robust sick policy implemented through daily symptom self-check; weekly testing for students with exemptions; and exempting students who have recovered from COVID-19 and

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[5] See National Center for Education Statistics, *Number of public school districts and public and private elementary and secondary schools: Selected years, 1869-70 through 2018-19*, https://perma.cc/PBJ2-DZHP (listing number of U.S. public school districts through 2018-2019).

[6] See also Sacramento City Unified School District, *COVID-19 Vaccination Requirement FAQs*, https://perma.cc/5YWH-LX8J.

have natural immunity. App.163, 186-190. Jill Doe has no religious objection to these alternative measures. App.151.

D. The proceedings below

Applicants initiated this action on October 22, 2021 and applied for a temporary restraining order on November 1. App.44, 262-281. The district court denied the temporary restraining order without a hearing and stated it would not grant an injunction pending appeal. App.42-52. Applicants immediately appealed, and the next day filed a motion for an injunction pending appeal with the Ninth Circuit.

On November 28, a divided panel of the Ninth Circuit issued an emergency injunction pending appeal, temporarily protecting students with religious objections. The majority granted the injunction for as long as a secular exemption for pregnant students remained in place. App.38-39. Judge Ikuta concurred in granting the motion but partially dissented, noting she would keep the injunction in effect until the school district "ceases to treat any * * * secular reasons more favorably than * * * religious reasons" for declining vaccination, not just pregnancy-related secular reasons. App.40. The following day, the District submitted a declaration from Interim Superintendent Lamont Jackson stating that he had unilaterally removed the pregnancy exemption and requesting the injunction be dissolved. App.142-143. Jackson explained he had inserted the pregnancy exemption without the approval of the Board of Education, and therefore he could remove it without the approval of the board. App.143.

On December 4, the same divided panel denied Applicants' motion in full. On neutrality, the majority held that the District's vaccine mandate does not specifically reference religion or religious practice and that Applicants "have not shown a likelihood of establishing that the mandate was implemented with the aim of suppressing religious belief, rather than protecting the health and safety of students, staff, and the community." App.10. Turning to general applicability, the majority concluded that Applicants have not raised a "serious question" on the issue. App.10. The majority explained that the District's medical exemption "would not qualify as 'comparable' to the religious exemption in terms of the 'risk' each exemption poses to the government's asserted interests," while noting that the record "does not disclose the number of students who have sought or are likely to seek a medical exemption." App.12 (citing *We The Patriots USA, Inc.* v. *Hochul,* 17 F.4th 266, 286-287 (2d Cir. 2021)). The majority distinguished conditional enrollment because it "is both of temporary duration and of limited scope," and likewise concluded that the exemption for students with IEPs was dissimilar because "any delay in vaccination caused by this provision is likely to be brief and limited to a small number of students." App.14-15.

Judge Ikuta dissented. Citing *Tandon*, the dissent concluded that strict scrutiny should apply and that the District failed to meet its burden under that demanding standard. Judge Ikuta noted that the majority here "err[ed] at the first step in the [general applicability] framework by focusing on the School District's reasons for offering an exemption, rather than the interest that the School District actually

asserts to justify the mandate." App.29. The District's mandate, Judge Ikuta explained, "treats secular and religious activity differently" by allowing "in-person attendance by students unvaccinated for medical reasons, and in-person attendance by unvaccinated new enrollees who meet certain criteria" while disallowing "*any* form of in-person attendance by students unvaccinated for religious reasons." App.27. Judge Ikuta characterized the majority's claim that "far fewer students will seek medical exemptions than religious exemptions" as "entirely speculative." App.29. In addressing the majority's point that conditional enrollment deferrals and a religious exemption are not comparable, the dissent called out the majority for "again confus[ing] the *reasons* for the exemption with the *asserted interest* that justifies the mandate." App.31. And given that the case implicates First Amendment freedoms, Judge Ikuta concluded that Applicants established a likelihood of irreparable injury and that the balance of hardships and public interest weighed in Applicants' favor. App.34-36.

E. Jill Doe's need for emergency relief

Jill Doe faces an unconstitutional choice: either violate her sincere religious beliefs or give up the benefits and privileges of in-person education. She will also lose out on the benefits of sports and extracurricular activities in the middle of her junior year—and any chance of earning an athletic scholarship for college. The District claims its decisions are "all about education" with the goal of having students "remain in school." App.58. According to California officials, "[e]ducators, public health experts and parents know there is no substitute for in-person instruction." App.337. Yet

because of her religious beliefs, Jill Doe will be "barred from in-person learning" and "barred from extracurricular activities" including sports. App.258. What is more, her efforts to remain anonymous will evaporate on January 24, when she is expelled from the classroom, locker room, and cafeteria, triggering hostility from classmates and teachers alike in a social media age where bullies are impossible to avoid. App.152, 157, 221-222.

Jill Doe faces all this at a time when experts on both sides of this case agree that mental health disorders including suicide, depression, and anxiety have "become more prevalent," App.128, due to "stress and isolation," App.221. According to the U.S. Surgeon General, depression and anxiety among young people doubled during the pandemic, and emergency visits for suicide attempts by teen girls were up 51% in 2020 compared to 2019.[7] The report listed "miss[ing] years of in-person schooling, graduation ceremonies, sports competitions" among the harms teens have faced during the pandemic, and found that "pandemic-related measures reduced in-person interactions among children, friends, social supports, and professionals," making it "harder to recognize * * * mental health concerns."[8]

Jill Doe faces irreparable harms from either violating her beliefs or giving up the opportunities her peers enjoy—and returning to the isolation they must no longer endure. She faces these harms even though more than three-quarters of the students in her District are exempt from the mandate.

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[7] Protecting Your Mental Health: The U.S. Surgeon General's Advisory (2021), https://perma.cc/94WM-UHYC.

[8] *Id.* at 9.

REASONS FOR GRANTING THE APPLICATION

Under the All Writs Act, this Court "may issue all writs necessary or appropriate" that aid its jurisdiction and are permitted by law. 28 U.S.C. 1651(a). An injunction pending disposition of a petition for a timely writ of certiorari is permissible where "applicants have clearly established their entitlement to relief pending appellate review." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (granting injunctions pending appeal to application filed under 28 U.S.C. 1651(a)). This showing is made where applicants demonstrate "that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Ibid.* (citing *Winter* v. *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)); see also *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (same). Applicants satisfy this standard.

I. The District's mandate violates the Free Exercise Clause.

A. Applicants' abstention from vaccination is a sincere and religious exercise.

No claim under the Free Exercise Clause can be made unless it is both sincere and religious. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972). Proving this is the religious claimant's burden. See *id.* at 235.

Here, Applicants have met this burden. They have put sworn evidence into the record that their beliefs are sincere and have maintained them in the face of threats, harassment, and loss of educational, scholarship, athletic, and extracurricular opportunities. App.149-151. And they have also presented sworn testimony that their

objections are religious, based in their Christian beliefs. App.149-151. Moreover, Applicants have explained the severe burden on those beliefs. App.149-151. The District has not contested the Does' sincerity or religiosity, and the courts below accepted them as proven. App.8 n.3 ("We may not and do not question the legitimacy of Jill Doe's religious beliefs regarding COVID-19 vaccinations.").

B. The District's mandate triggers strict scrutiny under the Free Exercise Clause in at least four different ways.

The mandate triggers strict scrutiny under the Free Exercise Clause in at least four separate ways.

1. The mandate triggers strict scrutiny under *Lukumi* and *Tandon* because it is subject to categorical exemptions.

The mandate triggers strict scrutiny because the District has created a series of categorical exemptions from mandatory vaccination. The Court has long recognized that categorical exemptions from government-created burdens trigger strict scrutiny under the Free Exercise Clause. The *Lukumi* Court called this the problem of "underinclusiv[ity]": "categories of selection are of paramount concern" when a law burdens religious practice. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542, 543 (1993). In *Lukumi*, the Court found Hialeah's rules governing animal killing substantially "underinclusive" and thus not generally applicable with regard to conduct that undermined the government's asserted interests "in a similar or greater degree." *Id.* at 543-544.

Similarly, in *Tandon* v. *Newsom* and *South Bay United Pentecostal Church* v. *Newsom*, the Court recognized that government actions—like selective burdens on

home worship—that "treat *any* comparable secular activity more favorably than religious exercise" trigger strict scrutiny under the Free Exercise Clause. *Tandon*, 141 S. Ct. at 1296 (per curiam) (citing *Diocese of Brooklyn*, 141 S. Ct. at 67-68 (per curiam)). Governmental action is not generally applicable if the government "openly impose[s] more stringent regulations on religious" activity than secular activity. *South Bay United Pentecostal Church* v. *Newsom* (*South Bay II*), 141 S. Ct. 716, 717 (2021) (Statement of Gorsuch, J.); see *ibid.* (Barrett, J., concurring). And also like *Lukumi*, *Tandon* judged "whether two activities are comparable for purposes of the Free Exercise Clause" "against the asserted government interest that justifies the regulation at issue." 141 S. Ct. at 1296. A law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

Here, the District enrolls more than 36,000 high school students, approximately 14,000 of whom are sixteen or older and thus covered by the mandate. App.72.[9] It has chosen to exempt thousands of these students—and many of its own employees—from its COVID vaccine mandate because of their age, medical condition, secular status, or simply its own administrative convenience.[10] Each of these exemptions presents "similar risks" to the District's interest in protecting health and safety because each

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9 Ed-Data, *District Summary: San Diego Unified*, https://perma.cc/Q2V5-7BX9.

10 Notably, some California school districts mandate student vaccination starting at age 12. See, *e.g.*, Los Angeles Unified School District, *Safe Steps to Safe Schools FAQs*, https://perma.cc/VNE5-BGGC; see also West Contra Costa Unified School District, *COVID-19 Vaccine Mandate*, https://perma.cc/V97R-CXKC.

of them results in unvaccinated people present during in-person learning. *Tandon*, 141 S. Ct. at 1296. As a result, the District's policy is not generally applicable, and the District must meet strict scrutiny, which it cannot do. *Infra* at Section I(C).

The majority reached the contrary conclusion only by narrowing its lens to focus on healthy students without an Individual Education Program who are already enrolled in the District and who are 16 by November 1, 2021. See App.6-12. But that is not how general applicability works. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296. Here, the District has asserted that its interest is in "health and safety," App.11, and this broadly formulated interest is equally undermined whether the unvaccinated person is 15 or 16 or 50. Yet the District has crafted a policy that does not apply to tens of thousands of its students and employees, who are allowed to be exactly what Jill Doe seeks to be: unvaccinated participants at in-person school. Those not covered include:

- Students under 16;
- Students who turned 16 after November 1, 2021;
- Students with conditional admissions;
- Students and staff with medical exemptions; and
- Staff with religious exemptions.

These groups are permitted to continue participating at in-person school despite being unvaccinated. Just accounting for students alone, the District exempts tens of thousands of students, comprising over 85% of all District students and over 60% of

high school students. And that doesn't factor in other ways that the District allows unvaccinated individuals on campus, such as unvaccinated visiting athletes at sports games. Such an "exception-ridden policy" is the "antithesis of a neutral and generally applicable policy." *Roberts* v. *Neace*, 958 F.3d 409, 413-414 (6th Cir. 2020).

In short, because the District's policy "contains myriad exceptions and accommodations for comparable activities"—allowing over 21,000 high school students and many employees to attend school in person while unvaccinated—it is not generally applicable and strict scrutiny applies. *Tandon*, 141 S. Ct. at 1298.

2. The mandate triggers strict scrutiny under the rule of *Lukumi* and *Fulton* because it provides for discretionary exceptions.

Similarly, the mandate triggers strict scrutiny because it creates a system of individual exemptions and a formal system of discretionary exceptions.

For several decades, the Court has recognized that where government imposes a burden on a large category of people but then creates a mechanism for individually exempting some people from the ambit of the burden, the exemption must be extended to religious people as well, unless the government has compelling reason not to. Relying on *Bowen* v. *Roy*, 476 U.S. 693 (1986) and *Smith*, the *Lukumi* Court held that "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." 508 U.S. at 537 (cleaned up).

In *Fulton*, the Court further explained that where a law "incorporates a system of individual exemptions," or includes "a formal system of entirely discretionary exceptions," strict scrutiny is triggered. 141 S. Ct. at 1878. Importantly, it does not

matter whether the system of exceptions has ever been used: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given[.]" *Id.* at 1879.

Here, the District has created a system that allows it to craft exemptions for certain students based on personal circumstances but not religious beliefs. App.297. The Board-approved language of the mandate states that students "[m]ay be conditionally enrolled [for] in-person learning if they are in one of these groups: foster youth, homeless, migrant, military family, or have an IEP," but that this conditional enrollment rule does not allow "religious or personal belief exceptions." App.297. The District has said that conditional enrollment only lasts for 30 days, but this is not in the text of the Board-approved mandate, App.297, and thus may be removed by the Interim Superintendent at his discretion. App.142-143. Further, the District indicated that the 30-day limit does not always apply to conditionally enrolled students with IEPs. App.80, 111-112, 297. The District is accordingly willing to create and modify exemptions for a variety of other reasons, just not religion. Such "entirely discretionary exemptions" trigger strict scrutiny. *Fulton*, 141 S. Ct. at 1878.

The District further demonstrated its discretionary authority by removing an exemption for pregnant teenagers in less than 24 hours. The day after the Ninth Circuit issued an injunction pending appeal based on the District's exemption for pregnant students, Interim Superintendent Jackson unilaterally revoked the exemption and moved to vacate the injunction. App.142-143. Jackson said he "authorized and directed that the option for pregnant students to request a deferral

of the vaccine mandate be removed" on his own authority. App.142. According to Jackson, because "the pregnancy deferral option was not the result of action or direction by the Board," he could remove this exemption absent Board approval. App.143. Jackson's litigation-driven decision to abruptly revoke the pregnancy exemption underscores his discretion to institute, modify, and eliminate exemptions from the District's policy. Like the unused discretion in *Fulton*, 141 S. Ct. at 1879, this discretion makes the District's policy subject to strict scrutiny.

3. The mandate triggers strict scrutiny under the rule of *Yoder* because it interferes with the Does' right as parents to control the upbringing of their daughter Jill.

The mandate also triggers strict scrutiny under the rule of the *Yoder* line of cases. In *Yoder*, this Court held that a rule impinging on parents' rights to control "the religious upbringing and education of their minor children" triggered strict scrutiny under the Free Exercise Clause. 406 U.S. at 231. *Yoder* drew on two earlier cases that have been treated as proto-Free Exercise cases because they predated incorporation of the Free Exercise Clause against the states: *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). *Meyer* and *Pierce* were thus formally decided on due process grounds, but both nevertheless later supported *Yoder*'s conclusion that parents have a "fundamental" interest "with respect to the religious upbringing of their children." 406 U.S. at 213-214. See, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965) (discussing *Meyer* and *Pierce* as First Amendment cases). *Smith* reaffirmed this line of precedent, describing "the right of parents * * * to direct the education of their children," recognizing that these claims still receive heightened scrutiny, and citing

Yoder and *Pierce* for the point. *Employment Div.* v. *Smith*, 494 U.S. 872, 881 (1990). More recently, the Court has repeatedly reaffirmed the unique role of religious education. For example, *Espinoza* reaffirmed as an "'enduring American tradition' * * * the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dept. of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Yoder*, 406 U.S. at 213-214). And pending before the Court is yet another case that concerns the right of parents to direct the religious upbringing of their children. See *Carson* v. *Makin*, No. 20-1088 (argued Dec. 8, 2021).

Here, the mandate triggers strict scrutiny under the *Yoder* line of cases because the District's mandate interferes directly with the ability of Applicants John and Jane Doe, Jill's parents, to direct the upbringing of their child. The District requires parental consent to obtain a COVID vaccine. App.322. By forcing the Does to have their child vaccinated—a medical procedure both the Does and Jill have sincere religious objections to—the District is directly interfering both with the Does' right to direct the religious upbringing of their child, and with Jill's right to have her upbringing controlled by her parents rather than a local government.

4. The mandate triggers strict scrutiny because it is not neutral under *Smith*.

Finally, the mandate is nothing like the neutral "across-the-board criminal prohibition" that only "incidentally" burdened religion in *Smith*. 494 U.S. at 884, 878.

Government actions are not neutral when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. Part of this "minimum requirement of neutrality" is that

the government cannot "single out" religion "for especially harsh treatment." *Diocese of Brooklyn*, 141 S. Ct. at 66. Yet that is precisely what happened here. The District implemented the mandate knowing that it would burden religious believers while exempting thousands of students for secular reasons. App.75, 62. The Vaccine Roadmap's very text refers specifically to religious exemptions and directs that they will be rejected. App.297, 322. And when the Ninth Circuit panel suggested that some of the secular favoritism must be pared back in order to continue refusing religious exemptions, the District swiftly removed protections it had previously provided for pregnant students, just so it could keep excluding religious students.

Nothing about this mandate is neutral or generally applicable, and the burdens on religion are hardly incidental. Laws that fail to operate "without regard to religion," or that otherwise "single out the religious" for disfavored treatment, "clear[ly] * * * impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2020-2021 (2017). Strict scrutiny is thus triggered here.

C. The mandate fails strict scrutiny.

Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). To pass the test, the District must prove that its denial of an exemption to Jill is "'narrowly tailored' to serve a 'compelling' state interest." *Diocese of Brooklyn*, 141 S. Ct. at 67. And "because [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Brown* v.

Entertainment Merchs. Ass'n, 564 U.S. 786, 799-800 (2011) (internal citations omitted).

Even though this Court has held that limiting the spread of COVID is generally a compelling government interest, see *Diocese of Brooklyn*, 141 S. Ct. at 67, the District cannot show that it has a compelling interest to burden Jill's religious exercise while exempting most other District students and hundreds of its staff from its mandate. Nor, for that reason, can it show that it has employed the least restrictive means toward Jill's religious exercise of advancing the interests it does have.

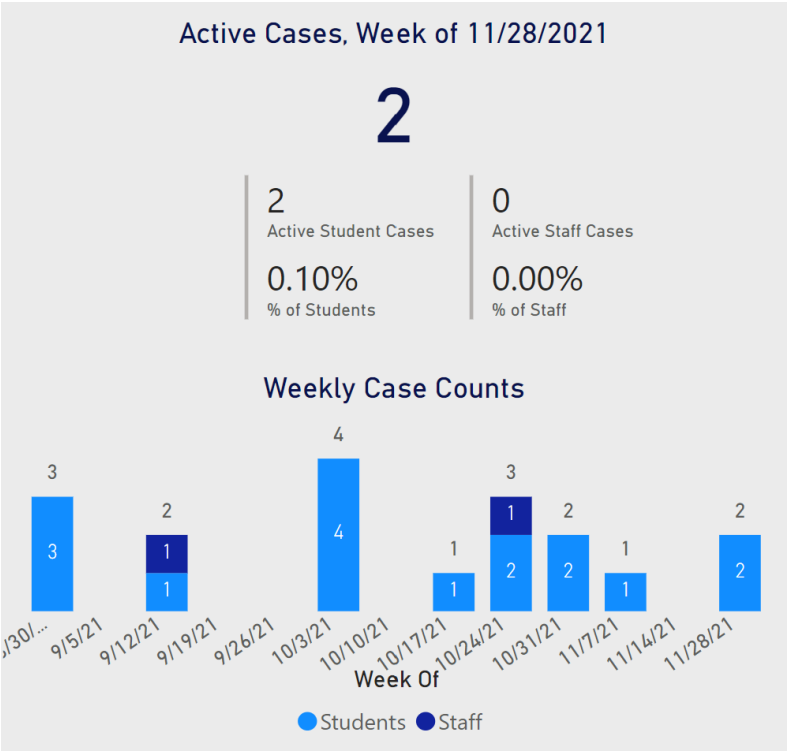
1. The District does not have a compelling interest in burdening Jill's religious beliefs.

The District must go beyond "broadly formulated interests" to meet its evidentiary burden, and instead prove that specific harm will result to compelling interests if it "grant[s] specific exemptions to particular religious claimants," *Fulton*, 141 S. Ct. at 1881 (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)), and that its denial of an exemption is "actually necessary" to prevent that harm, *Brown*, 564 U.S. at 799. The District can do neither.

Most obviously, the District's interest in excluding Jill cannot be compelling because it "leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. The underinclusiveness here is pronounced. The District's "primary interest for imposing the mandate" for on-campus students over age 16 is advancing "student health and safety." App.11. But the tens of thousands of exempt students in the District, including more than 21,000 exempt high school students, threaten that interest at least as much as Jill. As do exempt District staff. Given that

the District tolerates tens of thousands of unvaccinated persons on its campuses every day, its refusal to allow a single exemption for Jill "cannot be regarded as protecting an interest of the highest order." *Lukumi*, 508 U.S. at 547 (cleaned up).

Indeed, Jill poses *less* of a risk to the District's health-and-safety interests than many other exempt individuals because she has recovered from COVID. The District comes nowhere near its burden to prove that a single 16-year-old with natural immunity "is more dangerous" than the numerous exempt students and staff who have neither been vaccinated nor recovered from COVID. *Tandon*, 141 S. Ct. at 1296-1297. And that's particularly true on a campus that, since August 2021, has not had more than 0.2% of its students even test positive for COVID, and which most recently was at one-tenth of one percent:



Further, the District *expressly* accepts the exact same risk that it treats as unacceptable for Jill. In addition to all the unvaccinated students and employees who attend in-person school while exempt from the mandate for secular reasons, the District has resumed play of all traditional sports and has chosen to allow its students to play sports "against schools with no vaccine mandate" and thus against "teams with unvaccinated players." App.323. The District's written justification is that, "[b]ecause [District] students are vaccinated," they are adequately protected from exposure to unvaccinated student competitors. App.323. But it cannot be the case that allowing a single additional unvaccinated student—Jill—equal access to *education* is intolerably risky for her vaccinated peers, but letting those same peers play *sports* with unvaccinated students from other schools is acceptable—even in a context where unmasked and very close contact is inevitable. See *South Bay II*, 141 S. Ct. at 717 (Roberts, C.J., concurring) ("[T]he State's present determination * * * appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake.").

2. The District has not employed the least restrictive means of accomplishing its interests.

The "least-restrictive-means standard is exceptionally demanding" in that it requires the government to show "it lacks other means of achieving its desired goal." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. As applied here, this standard "requires the [District] to show that measures less restrictive of the First Amendment activity

could not address its interest in reducing the spread of COVID." *Tandon*, 141 S. Ct. at 1296-1297.

The District flunks this test for at least three independent reasons. First, because the District "permits other [individuals] to [access campus] with precautions, it must show that the religious exercise at issue is more dangerous than those [other individuals] even when the same precautions are applied." *Tandon,* 141 S. Ct. at 1297. The District has not made that showing. Indeed, because the District did not offer any evidence that it considered Jill's specific situation and developed specific reasons why it could not accommodate her, it was destined for failure on this score alone. *NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2376 (2018) (government flunked the narrow-tailoring test where it had "identified no evidence" to "prove" tailoring). Thus, "precautions that suffice for other activities suffice for religious exercise too." *Tandon*, 141 S. Ct. at 1296-1297; see also App.33 (Ikuta, J., dissenting) (the District "already accommodates teachers and staff who remain unvaccinated due to personal beliefs," which "shows that the School District has determined that it can satisfy its safety interests while still allowing persons unvaccinated on religious grounds to access campus"). In sum, because the District can accommodate Jill, it must.

Second, the District provides no justification for why it must have a mandate that is an extreme outlier nationally. Virtually no school system in the country imposes a similarly harsh mandate, which is "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic." *Diocese of Brooklyn*, 141 S. Ct. at 67. As Judge Ikuta notes, even the State of California's own proposed vaccine mandate

includes "a personal beliefs exemption, * * * which further suggests that the School District's mandate is stricter than necessary." App.33. "[W]hen so many" other jurisdictions "offer an accommodation, [the District] must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt* v. *Hobbs*, 574 U.S. 352, 369 (2015). And until departing from the national consensus, the District itself primarily used such alternative "substantial measures to protect the safety of all students," including masking, testing, distancing, facility ventilation, and upgraded HVAC filtration. App.315. Given that the District "has available to it a variety of approaches that appear capable of serving its interests," it must explain why it can no longer take the more common path, at least as it regards Jill. *McCullen* v. *Coakley*, 573 U.S. 464, 493-494 (2014) (considering policies of other states under intermediate scrutiny); *Holt*, 574 U.S. at 368-369 (same under strict scrutiny). Because the District did not offer that persuasive explanation, it cannot meet its burden.

Third, other governments treat those like Jill who enjoy natural immunity because they have recovered from COVID as equivalent or better than those who have been vaccinated. For example, in Germany, the government uses "2G" or "3G" rules, which stand for "geimpft, genesen, getestet"—vaccinated, recovered, or tested.[11] Under those rules, someone who has medical records showing that they have

[11] Bundesministerium für Gesundheit, *Geimpft, genesen, getestet – welche Corona-Maßnahmen aktuell gelten* (Dec. 3, 2021) [Federal Ministry of Health, *Vaccinated, recovered, tested – which measures are currently in force*], https://perma.cc/G45M-7BN5.

recovered from a bout of COVID is allowed to enter the same facilities as someone who has been vaccinated.

Indeed, recent peer-reviewed medical studies indicate that while vaccines provide robust protection from severe disease requiring hospitalization, natural immunity often provides similar protection. App.165-175 ("[T]he evidence to date strongly suggests that while vaccines—like natural immunity—provide protection against severe disease, they, unlike natural immunity, provide only short-lasting protection against subsequent infection and disease spread."). In an Israeli study of 187,000 unvaccinated persons with natural immunity, only 0.48% were reinfected and only 0.02% were hospitalized. App.168. And another peer-reviewed study of 43,044 patients found that just 129 were reinfected and only one severely. App.168. As similar studies continue to develop, they undermine the District's conclusion that for Jill Doe (but not tens of thousands of her classmates), vaccination is not only advisable but mandatory. And the District acknowledges that, simply by virtue of her status as a "school-age" child, Jill's "rate of sickness" is "very low compared to adults," including the teachers and staff that it exempts from the mandate even without proof of natural immunity. App.60.

II. The other injunctive relief factors support granting an injunction here.

Having shown "that their First Amendment claims are likely to prevail," Applicants need show only "that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Diocese of Brooklyn*, 141 S. Ct. at 66 (citing *Winter*, 555 U.S. at 20).

Irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)). As a result, "[r]eligious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation." *Agudath Israel of Am.* v. *Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020). Petitioners have established that violation: they are being penalized for following their faith.

Specifically, Applicants must choose between their religious exercise and the benefits and privileges of in-person education. Forcing Jill to reveal her medical choices and possibly her identity may expose her to previously threatened injury. App.152. And the lost benefits and privileges of an in-person education are significant. As Judge Ikuta's dissent noted, if that were *not* true, "then *all* unvaccinated students should participate in remote learning. Otherwise, the School District's mandate would be severely underinclusive." App.34 n.9. See also *infra* note 12. And the state of California has justified its own vaccine mandate on the basis that "Educators, public health experts and parents know there is no substitute for in-person instruction[.]" App.337. The loss of that for which there is no substitute is irreparable harm. The District has conditioned irreplaceable benefits and privileges on the surrender of First Amendment rights.

Public interest. Not only would protection for Applicants not harm the public interest, but it would *promote* the public interest. The school district already permits thousands of students under 16 to attend classes subject to testing, masking, and

other mitigation measures; presumably, some of those students attend the same classes as Jill Doe. Even many 16-year-olds may defer vaccination until next school year, so long as they turn 16 after November 1. Yet the District has not claimed that these students pose a health threat. Therefore, the District "has not shown that 'public health would be imperiled' by employing less restrictive measures." *Tandon*, 141 S. Ct. at 1297. And it is well accepted in the medical literature that keeping children out of school results in worse health and social outcomes.[12]

For these reasons, "applicants have clearly established their entitlement to relief pending appellate review." *Diocese of Brooklyn*, 141 S. Ct. at 66 (granting injunction pending appeal to application filed under 28 U.S.C. 1651(a)).

III. In the alternative, the Court should treat the application as a petition for certiorari and grant certiorari now.

Should the Court deem it inadvisable to grant emergency relief now, the Court should treat this application as a petition for certiorari and grant certiorari on a schedule that would allow Jill to return to her school and her teams as soon as possible.

As the Court is aware, there are a host of challenges to various government vaccination mandates pending in the lower courts and in this Court, some of which include religious liberty claims. For example, one set of petitioners in the consolidated

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[12] Jorge V. Verlenden et al., *Association of Children's Mode of School Instruction with Child and Parent Experiences and Well-Being During the COVID-19 Pandemic — COVID Experiences Survey, United States, October 8–November 13, 2020*, *Morbidity and Mortality Weekly Report*, March 19, 2021, https://perma.cc/UV3W-52SN; see also *Protecting Your Mental Health: The U.S. Surgeon General's Advisory* (2021), https://perma.cc/94WM-UHYC (citing medical studies).

challenges to the OSHA vaccine mandate raises religion-related objections to that mandate.[13] Other cases likewise involve a mix of non-religion-related claims and religion-related claims.[14] And of course, several religion-related challenges to state government vaccination mandates concerning healthcare workers remain pending before this Court.[15] This vaccination mandate litigation is of obvious nationwide importance. Cf. Rule 10.

Some of these cases—particularly those involving claims against the federal government—could end up turning on issues of governmental power, rather than religion-related grounds. See, *e.g.*, *BST Holdings, LLC* v. *OSHA*, 17 F.4th 604, 612 (5th Cir. 2021) (staying OSHA vaccination mandate on the basis that OSHA exceeded its statutory authority). However, other cases, like this one and the state healthcare

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[13] See *In re MCP No. 165*, No. 21-7000 (6th Cir., multidistrict litigation consolidation order filed Nov. 18, 2021), Response in Opp., Dkt.339-1 (filed Dec. 7, 2021) (raising RFRA and Free Exercise Clause challenges to OSHA mandate).

[14] See, *e.g.*, *Missouri* v. *Biden*, No. 4:21-cv-1329, 2021 WL 5564501, at *2 (E.D. Mo. Nov. 29, 2021) (enjoining CMS vaccination mandate); *Louisiana* v. *Becerra*, No. 3:21-cv-3970, 2021 WL 5609846, at *17 (W.D. La. Nov. 30, 2021) (enjoining CMS vaccination mandate); *Florida* v. *Department of Health & Hum. Servs.*, No. 21-14098, 2021 WL 5768796, at *11 (11th Cir. Dec. 6, 2021) (refusing to enjoin CMS vaccination mandate); *Hollis* v. *Biden*, No. 1:21-cv-163, 2021 WL 5500500, at *5 (N.D. Miss. Nov. 23, 2021) (refusing to enjoin federal contractor mandate due to lack of standing); *Kentucky* v. *Biden*, No. 3:21-cv-55, 2021 WL 5587446, at *14 (E.D. Ky. Nov. 30, 2021) (enjoining federal contractor vaccination mandate); *Georgia* v. *Biden*, No. 1:21-cv-163, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021) (enjoining federal contractor vaccination mandate); *US Navy SEALs 1-26* v. *Biden*, No. 21-cv-1236 (N.D. Tex. Nov. 30, 2021) (challenge to military vaccination mandate; preliminary injunction hearing set for Dec. 20, 2021).

[15] See *We The Patriots USA, Inc.* v. *Hochul*, No. 21A125 (application filed Nov. 1, 2021); *Dr. A.* v. *Hochul*, No. 21A145 (application filed Nov. 12, 2021); *Does 1-3* v. *Mills*, No. 21-717 (petition for cert. filed Nov. 11, 2021).

worker mandates, are more likely to turn on Free Exercise questions.

This case presents an ideal vehicle for the Court to address that latter class of vaccination mandate challenges. The relief sought is narrow and precise: an extension of the existing exemptions from the District's mandate to Jill. The outcome will turn entirely on the Free Exercise Clause question. And the case is factually clear, with a deep enough record on which to base a decision.

Aside from being an excellent vehicle for addressing litigation of nationwide importance, this case also meets the traditional factors this Court considers in deciding whether to grant certiorari. As we have shown above, and as Judge Ikuta explained, there are multiple grave conflicts between the Ninth Circuit's ruling below and this Court's Free Exercise precedents. See Rule 10(c). That is enough—especially given the nationwide importance of these issues—to warrant granting certiorari.

There is also, however, a circuit split over the application of the Free Exercise Clause that separately warrants plenary review. See Rule 10(a). On one side of the split stand decisions of the Third and Sixth Circuits. See *Dahl* v. *Board of Trs. of W. Mich. Univ.*, 15 F.4th 728, 732 (6th Cir. 2021) (subjecting Michigan public university's vaccination mandate to heightened scrutiny because it discriminated against student religious objectors and in favor of other students); *Fraternal Ord. of Police* v. *City of Newark*, 170 F.3d 359, 365-366 (3d Cir. 1999) (existence of medical exception triggered strict scrutiny under the Free Exercise Clause); see also *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting) ("The point is not whether one or a few secular analogs are regulated. The question

is whether a single secular analog is *not* regulated." (citation omitted)). On the other side of the split stand the Ninth Circuit's decision below and the decisions of the First Circuit and Second Circuit in the healthcare worker litigation still pending before this Court. See App.17; *Does 1-6* v. *Mills*, 16 F.4th 20, 30 (1st Cir. 2021); *We The Patriots*, 17 F.4th at 280, opinion clarified, 17 F.4th 368 (both holding that existence of medical exception did not trigger strict scrutiny under the Free Exercise Clause).

Given these factors, if the Court is unable to grant emergency relief, it should instead set this case for plenary review.

CONCLUSION

The Court should issue an injunction prohibiting enforcement of the District's mandate against Jill Doe until disposition of a petition for certiorari. Alternatively, the Court should treat the application as a petition for certiorari and grant certiorari now to address these important issues on the merits docket.

Respectfully submitted.

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